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# Supreme Court of the United States

TERM 1941

GEORGE T. MORTIMER,
Petitioner,

—*against*—

UNITED STATES OF AMERICA,
Respondent.

314-616

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

**Erroneous Construction and Application of recent Federal Statute 28 U. S. C. A. Sections 695 and 695-H, with respect to admissibility of incompetent hearsay testimony and documents. Conflict between decision of the Circuit Court of Appeals, Second Circuit, and decisions of Circuit Court of Appeals, Ninth Circuit, on construction of said Federal Statute. Also, apart from the Statute, admitted conflict between decision of Circuit Court of Appeals, Second Circuit, and decision of Circuit Court of Appeals, Sixth Circuit as to admissibility of incompetent hearsay evidence. Prejudicial error in compelling petitioner to testify in contravention of immunity guaranteed by United States Constitution, Fifth Amendment. Prejudicial errors affecting substantial rights of petitioner.**

JOHN T. DOOLING,
Attorney for Petitioner.

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CHRISTOPHER S. SARGENT,
*Of Counsel.*

## INDEX TO PETITION.


| | PAGE |
|---|---|
| Opinion Below | 2 |
| Jurisdiction | 2 |
| Constitution and Statutes Involved. | 2 |
| Summary and Short Statement of Matter Involved | 4 |
| The Questions Presented | 8 |
| Reasons for Allowance of Writ | 8 |


## INDEX TO BRIEF


| | |
|---|---|
| I. Opinion of the Court Below | 13 |
| II. Jurisdiction | 13 |
| III. Statement of the Case | 14 |
| IV. Specification of Assigned Errors To Be Urged | 14 |
| Argument | 16 |
| POINT I. It was reversible error to compel petitioner on cross examination, over objections and exceptions, to testify that he did not accept an invitation from Government Counsel to appear and testify before the Federal Grand Jury investigating this case. The learned Circuit Court of Appeals erred in affirming Petitioner's conviction, brought about, in part, by this improper prejudicial cross examination | 16 |

PAGE

POINT II. The learned Circuit Court of Appeals erred in holding that the Trial Court properly received in evidence the incompetent hearsay Karcher testimony, charts, summaries and graphs ..... 22

A. The Incompetent Hearsay Nature of Government Witness Karcher's Testimony, Charts, Summaries and Graphs ..... 22

B. Error Committed by the Circuit Court of Appeals in Connection With the Incompetent Hearsay Karcher Testimony, Charts, Summaries and Graphs ..... 26

C. The Cases Cited by the Learned Circuit Court Do Not Justify the Admission of Karcher's Incompetent Hearsay Testimony, Charts, Summaries and Graphs .. 32

D. The Circuit Court of Appeals in Holding that the Incompetent Hearsay Testimony, Charts, Summaries and Graphs of Government Witness Karcher Relating to Alleged Tax Arrears were Properly Received in Evidence, has so far Sanctioned a Departure, by the Lower Court, from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision ... 34

POINT III. The learned Circuit Court of Appeals construction and application of recent Federal Statute Title 28 U. S. C. A. Sections 695 and 695-h was erroneous ..... 35

PAGE

A. The Recent Federal Statute, Title 28 U. S. C. A. Section 695 ..... 35

B. The Fallacious Argument of the Circuit Court ..... 35

C. Northern Pac. Ry. Co. v. Keyes (91 Fed. 47; 8 Circuit), Distinguished ..... 38

POINT IV. The learned Circuit Court of Appeals for the Second Circuit, in construing Title 28 U. S. C. A. Sections 695 and 695-h, has rendered a decision herein in direct conflict with the decisions of the Ninth Circuit Court of Appeals ..... 40

Point V. As stated in the opinion of the learned Circuit Court of Appeals Second Circuit herein there is direct conflict between our Circuit Court and the Sixth Circuit Court of Appeals 41

POINT VI. The learned Circuit Court of Appeals in construing and applying Title 28 U. S. C. A. Sections 695 and 695-h, has decided an important question of Federal law which has not been but should be settled by this Court; and has decided it in such a way that the public interest will be promoted by prompt settlement in this Court of the questions involved ..... 44

POINT VII. An erroneous ruling which relates to the substantial rights of a party is ground for reversal, unless it affirmatively appears from the whole record that it was not prejudicial .. 45

POINT VIII. Conclusion ..... 49

## CITATIONS

*Cases*:

Brady v. United States, 24 F. 2d 399, 403 (C. C. A. 8) ..... 20
Bruno v. United States, 308 U. S. 287 ..... 20
Burton v. Driggs, 87 U. S. 125 ..... 9, 32, 34

Commonwealth v. Smith, 163 Mass. 411 ..... 18
Copeland v. United States, 90 F. 2d 78 (C. C. A. 5) .... 10
Counselman v. Hitchcock, 142 U. S. 547 ..... 9, 21

Dahly v. United States, 50 Fed. 2d 37 (C. C. A. 8) .... 10
Dickerson v. United States, 18 F. 2d 887 ..... 12
Durland v. United States, 161 U. S. 306 ..... 11

E. I. DuPont de Nemours & Co. v. Tomlinson, 296 F. 634, 640 ..... 34
Etheredge v. United States, 186 Fed. 434 (C. C. A. 5) .. 10

Fillipon v. Albion Vein Slate Co., 250 U. S. 76, 82 .... 45
Freeman v. United States, 20 F. 2d 748 (C. C. A. 3) .. 20

Galbreath v. United States, 257 F. 648, 658 ..... 32
Graham v. United States, 15 F. 2d 740 (C. C. A. 8) .. 10
Greenbaum v. United States, 98 F. 2d 574 (C. C. A. 9) ..... 9, 40

Langer v. United States, 76 F. 2d 817 ..... 12

Massachusetts Bonding Insurance Co. v. Norwich Pharmacal Co., 18 F. 2d 934 ..... 34
Matter of Doyle, 257 N. Y. 244 ..... 21
Mazurosky v. United States, 100 F. 2d 958, 961 (C. C. A. 9) ..... 11
McCandless v. United States, 298 U. S. 342 ..... 45
Miller v. United States, 133 Fed. 337 (C. C. A. 8) .... 10
Morton Timber Company v. United States, 91 F. 2d, 884, 889 (C. C. A. 6) ..... 10, 41, 44

PAGE

Northern Pac. Ry. Co. v. Keyes, 91 Fed. 47 (C. C. A. 8) ..... 37, 38, 39

People v. Brown, 72 N. Y. 571, 573 ..... 21
People ex rel. Lewisohn v. O'Brien, 176 N. Y. 253 .... 21
People v. Michor, 226 App. Div. 569 ..... 21
People v. Russo, 251 App. Div. 176 ..... 21
Pettibone v. United States, 148 U. S. 197 ..... 10, 48

Queen v. Hepburn, 11 U. S. 290 ..... 9, 34, 43

Re The Spica, 289 F., 436 ..... 33
Raffel v. United States, 271 U. S. 494 ..... 18

Salinger v. United States, 23 F. 2d 48 ..... 12
Shannabarger v. United States, 99 F. 2d 957 ..... 12
Shreve v. United States, 103 F. 2d 796 (C. C. A. 9) ... 9, 40
Shepard v. United States, 290 U. S. 96 ..... 10, 34, 47
Spalitto v. United States, 39 F. 2d 782 ..... 12
Stephens v. United States, 41 F. 2d 440 ..... 32

The Great Northern Railway v. Washington, 300 U. S. 154, 168-174 ..... 9, 34, 43, 44
Tomlinson v. United States, 93 F. 2d 652 (certiorari denied 303 U. S. 646) ..... 18, 19

Ulm v. Moore-McCormack Lines, Inc., 2 Cir., 115 F. 2d 492, 117 F. 2d 222 ..... 35, 36, 37
United States v. Becker, 62 F. 2d 1007 ..... 34
United States v. Bob, 106 F. 2d 37 (C. C. A. 2) ..... 12
United States v. Buckner, 108 F. 2d 921 (certiorari denied 309 U. S. 669) ..... 18
United States v. Carll, 105 U. S. 611 ..... 10, 48
United States v. Cotter, 60 F. 2d 689, 693 (C. C. A. 2) ..... 34, 42
United States v. Cruikshank, 92 U. S. 542 ..... 10, 48
United States v. Dilliard, 101 F. 2d 829 (C. C. A. 2) .. 12
United States v. Hess, 124 U. S. 483 ..... 10, 48
United States v. Kelly, 105 Fed. 2d 912, 917 (C. C. A. 2) 29

PAGE

United States v. Kissel, 218 U. S. 601 ..... 11
United States v. Rabinowich, 238 U. S. 78 ..... 11
United States v. River Rouge Co., 269 U. S. 411, 421 .. 45, 46
United States v. Simmons, 96 U. S. 360 ..... 10

Vernon v. United States, 146 Fed. 121, 126 (C. C. A. 8) 20

Weniger v. United States, 47 Fed. 2d 692 (C. C. A. 9) .. 10
Williams v. Gr. Southern Lumber Co., 277 U. S. 19, 26 ..... 45, 46

*Statutes*:

Title 18 U. S. C., Section 338, Section 88 ..... 1

Title 18, U. S. C. A.
Section 632 ..... 2, 9
Section 88 ..... 3, 8, 10, 15

Title 28, U. S. C. A.
Section 695 ..... 3, 9, 15, 35, 38, 39, 40, 44
Section 695-h ..... 4, 9, 15, 35, 40, 44

Judicial Code, Section 240 (a) (as amended by the Act of February 13th, 1925 (U. S. C. Title 18, Sec. 347)) ..... 2, 13

Rules of Practice and Procedure in Criminal Cases, Rule XI ..... 2

Constitution of the United States; Fifth Amendment .. 9, 17

N. Y. Civil Practice Act, Sec. 382 ..... 25, 31
Sec. 385 ..... 25, 31

Wigmore on Evidence (3d Ed), Section 1218 ..... 32

Wigmore on Evidence (3d Ed), Section 1230 ..... 32, 33

Wigmore on Evidence (3d Ed), Sections 1421, 1422, 1714 ..... 47

Thayer, Preliminary Treatise on the Law of Evidence, 266, 516 ..... 47

# Supreme Court of the United States

TERM 1941

GEORGE T. MORTIMER,

Petitioner,

*—against—*

UNITED STATES OF AMERICA,

Respondent.

## *PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

*To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, George T. Mortimer, respectfully prays that a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit issue to review the judgment of that Court, entered on April 2nd, 1941, affirming judgment of the District Court of the United States for the Southern District of New York, entered February 19, 1940, convicting the petitioner of the crimes of using the mails to defraud, in violation of Title 18 U. S. C., Section 338, and of conspiracy to commit said offense against the United States in violation of Title 18 U. S. C.; Section 88.

### *Opinion Below.*

The Opinion of the Circuit Court of Appeals, filed March 17th, 1941 (pp. 3494-3503*), is reported in 118 F. 2d. 266. The United States District Court rendered no opinion.

### *Jurisdiction.*

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on April 2, 1941 (p. 3504), and order for issuance of mandate was made by the Circuit Court on April 2, 1941. No mandate has been issued by said Circuit Court because an order was made by said Court on April 2nd, 1941, staying issuance of the mandate of that Court pending an application to this Court for a writ of *certiorari*. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (U. S. C. Title 18, Sec. 347), and Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court, May 7, 1934.

### *Constitution and Statutes Involved.*

CONSTITUTION OF THE UNITED STATES; Article V of Articles in addition to and amendments of the Constitution of the United States of America.

"No person * * * shall be compelled in any criminal case to be witness against himself * * *".

"TITLE 18, U. S. C. A.

"Section 632: DEFENDANTS IN CRIMINAL CASES. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the

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* Numbers in parentheses refer to folios in Record except where otherwise indicated.

commission of crimes, offenses, and misdemeanors, in the United States Court, * * * in any State * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

"TITLE 18, U. S. C. A.

Sec. 88 (Criminal Code, Section 37.) CONSPIRING TO COMMIT OFFENSE AGAINST UNITED STATES.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

TITLE 28, U. S. C. A.

Writings and Records made in the Regular Course of Business.

"Sec. 695. ADMISSIBILITY: In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, in-

cluding lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind * * *".

"TITLE 28, U. S. C. A.

"Sec. 695-h: PROSPECTIVE NATURE OF SUB-CHAPTER. Section 695 * * * shall be prospective only, and not retroactive."

## *Summary and Short Statement of Matter Involved.*

### I.

Petitioner is charged with violation of the mail fraud statute, Title 18, Section 338, and the conspiracy statute, Title 18, Section 88 of the United States Code. Other defendants named in the indictment were New York Title & Mortgage Company (hereinafter referred to as "Company").

Upon the trial the Government withdrew Counts 7, 8 and 9; and at the close of the trial, upon Government's motion, the indictment was dismissed as to all corporate defendants. After a trial lasting 12 weeks defendant Shields was acquitted on all counts, defendant Breitwieser was acquitted on the conspiracy count and found guilty on counts 1, 2, 3, 4, 5, 6, 10, 11, 12 and 13; defendant Williams was found guilty on counts 1, 2, 3, 4, 5, 6, 10, 11 and 14, and not guilty on counts 12 and 13. Petitioner was found guilty on counts 1, 2, 3, 4, 5, 6, 10, 11 and 14, and not guilty on counts 12 and 13, and was sentenced to 2 years on each count, sentence to run concurrently, and fined $5,000.

Petitioner alone appealed from the judgment of conviction.

## II.

Petitioner was a real estate man of wide experience; prior to 1925 he had specialized in the management of large properties. In 1925 he retired from active business, on advice of his physician, and until he assumed the Presidency of the Company, June 1, 1930, devoted himself to restoring his impaired health and attending to his own personal and his family's business affairs (4661-67).

*The Company*: The Company was organized in 1901 with a paid-in capital of $2,000,000. In June 1930, when petitioner became its President, it had assets of approximately $67,000,000 (Defts'. Ex. Z; 9922-24); its main office was at 141 Broadway, New York City, with eleven (11) branch offices in the Metropolitan District. In 1930, 1931 and 1932, it had about 1700 employees and about 60 executive and administrative officers (4691-2). It operated under the Insurance Laws of the State of New York, and under the supervision of the Insurance Department; its affairs and books were regularly audited by the State. Each year it filed its Annual Report and Financial Statement with the Insurance Department, and in 1932 it filed special Monthly Reports.

*Petitioner's Duties as President*: At no time was petitioner either the Company's Chief Executive Officer (4920) or its policy forming officer, or general manager of its affairs. Petitioner was President from June 1930 to November, 1932. From June 1, 1930 to April 21, 1931, the Chief Executive Officer, and the one responsible for the policies of the Company was defendant Kahler. From April 21, 1931 until November 30th, 1932, defendant Williams was the General Manager and Chief Executive Officer; he had charge of and managed the affairs of the Company and actively supervised all Departments. During the latter part

of 1931 and until November 30th, 1932, when petitioner resigned, petitioner devoted substantially all his time to the management of the rapidly accumulating volume of real estate which the Company had acquired, through foreclosures, or managed under assignments of rent (4773; 5060-61; 5352; 5375). As of November 30, 1932, 2,566 separate and distinct pieces of property, of a total value of over $200,000,000, were under his management (Government's Ex. 546; 2934). This was the real work to which petitioner gave his attention in the interest of the Company and its investors. In view of the fact that petitioner's time and energies were very largely employed, during 1931 and 1932, in the management of the Company's acquired real estate, his other activities during that period, consisting of attendance at meetings of the Loan and Executive Committees, his occasional inspection of properties, and his attendance, as a Director, at meetings of the Board, were but an incidental part of petitioner's work. Although President in name, his real function was that of manager of the Company's real estate,—the special emergency problem resulting from the depression and the one assigned to him because of his experience in that field.

*Financial Condition of the Company*: Government witness Obermayer, the Company's Treasurer, testified that the Company's Annual Financial Statement and Report as of December 31st, 1931 (Gov. Ex. 501), which was prepared, signed and sworn to by him, and defendants Burdett and Breitwieser, *was correct* (1217-18), and that "It was a true Statement of the conditions of the Company at that time" (1334-35). He also testified, with respect to the Company's Annual Report of condition as of December 31st, 1932 (Gov. Ex. 502), prepared by him and filed with the Department of Insurance, that he thought the Company was in a sound financial position,

and solvent (1252-3). As of December 31st, 1932 the Company had, according to its Annual Statement, assets of $55,000,000. in excess of direct liabilities (exclusive of contingent liabilities on its guaranteed mortgage certificates), a surplus of $20,000,000. and undivided profits of over $11,000,000. Its cash on hand or deposited in banks amounted to approximately $9,000,000 (1252-53). Obermayer further testified that he

"believed in the integrity of the Company" (1251-1254),

and that the Company's guaranty fund was *intact* in December, 1932 (1396-97). Each and every one of the special Company Monthly Reports prepared by him during 1932 shows that the Company was solvent. He testified:

"I signed those reports; and they were correct" (1251).

*Petitioner's Good Faith*: Definite proof of petitioner's good faith and of his innocence of the charges of using the mails to defraud and of conspiring so to do is shown by the fact that petitioner, in January, 1931, directed that all correspondence and inquiries from investors as to mortgages and certificates be answered promptly by letter (Defts'. Ex. O, (2)), that petitioner, and his family, were substantial investors in the stock of the defendant Company and together owned stock of the value of approximately $750,000., which stock (converted into stock of the Manhattan Company about December, 1929) petitioner and his family still hold, that petitioner throughout 1932 opposed the declaration and payment of dividends by the Company (4938-9), that petitioner and his family were substantial investors (throughout the entire period he was President), in the mortgages and mortgage certificates issued by the Company, —their investments aggregating $172,200., of which $64,000. were made from January to August, 1932, and sustain peti-

tioner's contention that there is no substantial proof of his alleged guilt and that the learned Circuit Court of Appeals erred in affirming petitioner's conviction.

### *The Questions Presented.*

1. Whether the trial Court erred in ruling that petitioner, on cross examination, over objections and exceptions, should testify that he did not accept an invitation from Government counsel to appear and testify before the Federal Grand Jury investigating this case?

2. Whether the trial Court erred in admitting in evidence, over objections and exceptions of petitioner, the incompetent hearsay testimony of Government witness Karcher concerning alleged tax arrears, and the incompetent hearsay charts, summaries and graphs prepared by Karcher allegedly showing said arrears?

3. Whether the Circuit Court of Appeals erred in its construction and application of the recent Federal Statute, Title 28 U. S. C. A., Secs. 695 and 695-h?

4. Whether the Circuit Court of Appeals erred in its construction and application of the Federal Conspiracy Statute, Title 18, Sec. 88 U. S. C. A.?

5. Whether the trial Court erred in holding that the conspiracy count (Fourteenth Count of Indictment) charges a crime as a matter of law?

### *Reasons for Allowance of Writ.*

This application to permit a review of the judgment of the Circuit Court of Appeals is grounded on the following special and important reasons:

1. The Circuit Court of Appeals, in sustaining the trial Court's ruling which compelled petitioner, on cross examination, over objections and exceptions, to testify that he did not accept the invitation of Government counsel to appear and testify before the Federal Grand Jury investigating this case, has decided an important question of Federal Constitutional law which has not been, but should be, settled by this Court (Constitution of the United States; Fifth Amendment; Title 18, Sec. 632, U. S. C. A. *Counselman* v. *Hitchcock,* 142 U. S., 547). The public interest will be promoted by the prompt settlement in this Court of said question.

2. The Circuit Court of Appeals, in holding that the trial Court properly received in evidence, over the objections and exceptions of petitioner, the incompetent hearsay testimony of Government witness Karcher concerning alleged tax arrears and the incompetent hearsay charts, summaries and graphs prepared by Karcher showing said alleged arrears, has so far sanctioned a departure, by the lower Court, from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision (*Burton* v. *Driggs,* 87 U. S. 125; *The Great Northern Railway* v. *Washington,* 300 U. S. 154; *Queens* v. *Hepburn,* 11 U. S. 290).

3. The Circuit Court of Appeals, in construing and applying Federal Statute Title 28, U. S. C. A., Sections 695, and 695(h), has (1) rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter (*Greenbaum* v. *United States,* 98 F. 2d, 574 (C. C. A. Ninth Circuit); *Shreve* v. *United States,* 103 F. 2d, 796 (Ninth Circuit), and (2) has decided an important question of Federal law which has not been, but should be, settled

by this Court; and (3) has decided it in such a way that the public interest will be promoted by prompt settlement in this Court of the questions involved (*Shepard* v. *United States,* 290 U. S. 96).

4. The Circuit Court of Appeals in affirming petitioner's conviction rendered a decision in direct conflict with a decision of the Sixth Circuit Court of Appeals on the important question of the admissibility of hearsay testimony (*Morton Timber Company* v. *United States,* 91 F. 2d, 884, 889).

5. The Circuit Court of Appeals, in sustaining the conspiracy count (the Fourteenth Count of the Indictment), has (a) decided a Federal question in a way probably in conflict with applicable decisions of this Court (*United States* v. *Hess,* 124 U. S. 483; *United States* v. *Carll,* 105 U. S. 611; *United States* v. *Simmons,* 96 U. S. 360; *United States* v. *Cruikshank,* 92 U. S. 542; *Pettibone* v. *United States,* 148 U. S. 197), and (b) has decided a Federal question in conflict with the decisions of other Circuit Courts of Appeals on the same matter (*Miller* v. *United States,* 133 Fed. 337 (C. C. A. 8); *Etheredge* v. *United States,* 186 Fed. 434 (C. C. A. 5).

6. The Circuit Court of Appeals in affirming petitioner's conviction has, in its construction and application of the Federal Conspiracy Statute, 18 U. S. C. A., Section 88 (Criminal Code Section 37), (a) rendered a decision in conflict with the decisions of other Circuit Courts of Appeals, on the same matter (*Graham* v. *United States,* 15 F. 2d 740 (C. C. A. 8); *Weniger* v. *United States,* 47 Fed. 2d 692 (C. C. A. 9); *Dahly* v. *United States,* 50 Fed. 2d 37 (C. C. A. 8); *Mazurosky* v. *United States,* 100 F. 2d 958 (C. C. A. 9); and *Copeland* v. *United States,* 90 F. 2d 78

(C. C. A. 5); and (b) has decided a Federal question in a way probably in conflict with applicable decisions of this Court (*United States* v. *Rabinowich,* 238 U. S. 78; *United States* v. *Kissel,* 218 U. S. 601, *Durland* v. *United States,* 161 U. S. 306). The public interest will be promoted by prompt settlement in this Court of the questions involved.

## III.

To accomplish petitioner's conviction the prosecution, over objections and exceptions, compelled petitioner to testify that he did not accept an invitation of Government's counsel to appear and testify before the Federal Grand Jury investigating this case, by which improper cross examination the Jury was induced to draw inference on inference prejudicial to petitioner, and petitioner's Constitutional right against self-incrimination was violated; introduced into evidence, over objections and exceptions, incompetent hearsay testimony, charts, graphs and summaries of Government witness Karcher concerning the controversial issue of alleged tax arrears.

## IV.

Petitioner contends that his conviction rests upon nothing more substantial than suspicion, which was based on nothing more than his innocent association, as President, with the men who actually conducted and were responsible for the Company's mortgage and mortgage certificate business and the sale of said securities; that such suspicion does not rise to the dignity of proof, and is insufficient to sustain his conviction (*Mazurosky* v. *United States,* 100 F. 2d 958, 961, C. C. A. 9, 1939; *Copeland* v. *United States,* 90 F. 2d 78, C. C. A. 5, 1937); that, under the well-established rule that the evidence adduced must not only be consistent with the guilt of a defendant but also inconsistent

with his innocence (*Shannabarger* v. *United States*, 99 F. 2d 957; *Dickerson* v. *United States*, 18 F. 2d 887; *Spalitto* v. *United States*, 39 F. 2d 782; *Salinger* v. *United States*, 23 F. 2d 48; *Langer* v. *United States*, 76 F. 2d 817), petitioner's conviction was improper; that the Conspiracy Count (Fourteenth Count of the Indictment) is defective as a matter of law; and that the Circuit Court of Appeals erred in affirming petitioner's conviction.

## V.

Petitioner contends that *United States* v. *Dilliard* (101 F. 2d 829, 2 Cir.) and *United States* v. *Bob*, 106 F. 2d 37, 2 Cir.), cited by the learned Circuit Court of Appeals, are so radically different from the instant case as to have no application thereto.

WHEREFORE, your petitioner prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all procedings of said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed, and the petitioner be granted such other and further relief as may seem proper.

Dated: New York, N. Y., May 6th, 1941.

GEORGE T. MORTIMER,
Petitioner.

By JOHN T. DOOLING,
Counsel for Petitioner.

THEODORE KIENDL,
CHRISTOPHER S. SARGENT,
*Of Counsel.*